82-2150

FILED
JUL 1983
ALEXANDER L. STEVAS,
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

No. _____

NATHAN PLATT,
Petitioner,

V.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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I.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Eighth Circuit Court of Appeals erred in affirming the issuance of search warrants and warrants authorizing surveillance and the attachment of electronic devices as said warrants were bsed on insufficient affidavits and were issued in the absence of probable cause.

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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Comes now the Petitioner, Nathan Platt, and petitions the Supreme Court of the United States to issue the writ of certiorari to review a decision of the United States Court of Appeals for the Eighth Circuit, and in support thereof would show unto the Court as follows:

II.

PARTIES

The Petitioner is Nathan Platt. The Petitioner was the Defendant in a criminal action wherein said Defendant was charged with conspiracy to manufacture methaqualone, in violation of 21 U.S.C. §841(a)(1) and with possession of punches and dies designed to imprint a pharmaceutical company marking for methaqualone, in violation of 21 U.S.C. §843(a)(5).

The Respondent is the United States of America in whose name the indictments were brought against the Defendant and who was represented by the United States Attorney in the prosecution of this matter.

III.

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1. The Fourth Amendment to the United States Constitution requires that a warrant is not to be issued except upon probable cause shown by oath or affirmation, and therefore, the court erred in issuing search warrants and warrants authorizing surveillance and attachment of electronic devices as said warrants were based upon insufficient affidavits and were issued in the absence of probable cause.

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APPENDICES

A. Opinion of the Eighth Circuit Court of Appeals, filed April 15, 1983
B. Opinion Denying Rehearing, Eighth Circuit Court of Appeals, filed June 2, 1983
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IV.

TABLE OF AUTHORITIES

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United States v. Bailey,
628 F.2d 938 (6th Cir. 1980) 14

United States v. Moore,
562 F.2d 106 (1st Cir. 1977) 14, 15

Aguilar v. Texas,
378 U.S. 108, 84 S.Ct. 1509 (1964) 18, 19, 22

Spinelli v. United States,
393 U.S. 410, 89 S.Ct. 584 (1969) 19

United States v. Skramstad,
649 F.2d 1259 (8th Cir. 1981) 20, 21

United States v. Fleming,
566 F.2d 623 (8th Cir. 1977) 20, 21

United State v. Chavez,
482 F.2d 1268 (5th Cir. 1973) 22

Wong Sun v. United States,
371 U. S. 471, 83 S.Ct. 407 (1963) 25

United States v. Crews,
445 U. S. 463, 100 S.Ct. 1244 (1980) 25

V.

OPINIONS DELIVERED IN COURTS BELOW

Petitioner would show unto this Court that there are two primary opinions in this Court which have been delivered in the Courts below. On April 15, 1983 there was a formal opinion issued by the United States Court of Appeals for the Eighth Circuit, which opinion was filed in said Court on April 15, 1983 affirming the conviction of the Defendant, Nathan Platt, rendered in the United States District Court for the Eastern District of Missouri.

The second formal opinion issued by a Court below was the Order Overruling Appellant Nathan Platt's motion for rehearing, which order was filed in the United States Court of Appeals for the Eighth Circuit on June 2, 1983.

These opinions are made Exhibits A and B, respectively, to this Petition.

VI.

JURISDICTION

Petitioner, Nathan Platt, prays for the United States Supreme Court to review the decision of the United States Court of Appeals for the Eighth Circuit filed April 15, 1983.

Petitioner prayed for a rehearing to the Eighth Circuit Court of Appeals, which rehearing was had and duly considered and was overruled by the United States Court of Appeals for the Eighth Circuit on June 2, 1983. Further, Petitioner would show that he has not prayed for an extension of time to perfect this Petition to the United States Supreme Court. Also, Petitioner would assert that there is no cross petition for the writ of certiorari.

The statutory basis and/or jurisdictional basis for the bringing of this petition is pursuant to Rule 17 of the Rules of the Supreme Court of the United States and further pursuant to Rule 20 of the Rules of the Supreme Court

of the United States. This petition is filed within sixty days of the final decision of the Eighth Circuit Court of Appeals.

VII.

CONSTITUTIONAL PROVISIONS AND OTHER APPLICABLE PROVISIONS OF LAW

Petitioner would show that he has been denied substantive due process of law and equal protection of the law under the Fourth Amendment of the Constitution of the United States.

The Fourth Amendment is made Appendix C to this petition.

VIII.

STATEMENT OF THE CASE

This Petition for Writ of Certioriari seeks to review a ruling of the United States Magistrate sustaining the issuance of search warrants and warrants authorizing surveillance and attachment of electronic devices and the subsequent opinion of the United States

Court of Appeals for the Eighth Circuit, which opinion affirmed the issuance of said search warrants and warrants authorizing the surveillance and attachment of electronic devices. The Defendant is Nathan Platt and will generally be referrred to hereafter as "Petitioner." The Plaintiff in the United States District Court was the United States of America and will generally be referred to hereafter as "Respondent."

References to the pleadings and facts cited in this petition will be made to the transcript of the hearing before the Magistrate of the United States District Court for the Eastern District of Missouri and will be cited as (Tr.) with appropriate page numbers noted.

A.

Statement of the Facts

The facts which support this Petition for Writ of Certiorari commenced with the filing of an affidavit by an agent of the Drug Enforcement Administration, which affidavit stated in effect that: the affiant was a D.E.A. agent with experience in controlled substance law enforcement; the electronic device to be used is only an electronic "tracking device"; an unnamed "confidential" informant reported that two individuals ordered a tablet press and punches and dies from Advance Engineering; Advance Engineering is a legitimate business dealing in tablet presses and punches and dies; the informer had given information in the past which resulted in the arrest of at least four people; and the informant states that the press is to be moved within seven days.

Pursuant to said affidavit, the United States Magistrate issued the warrants authorizing the electronic surveillance and the attachment of electronic tracking devices. Thereafter, the tablet press was tracked, subsequently confiscated, adn the Defendant, Nathan Platt, indicted and convicted of conspiracy to manufacture methaqualone in violation of 21 U.S.C. §841(a)(1) and with violation of 21 U.S.C. §843(a)(5) for the possession of punches and dies designed to render tablets of a drug counterfeit substance.

The Petitioner now contends that the issuance of the search warrants and warrants authorizing surveillance and the attachment of electronic devices was in violation of the Fourth Amendment to the United States Constitution and that the issuance of such warrants is in violation of principles in cases decided by the United States Supreme Court previously. Said decisions specifically deal with the guidelines for issuing search warrants, which guidelines were not followed

by the Magistrate in issuing the specific warrants in this case. The failure of the U. S. Magistrate to follow the guidelines set forth in decisions of the United States Supreme Court regarding the issuance of search warrants and the subsequent affirmation of the issuance of the search warrants by the United States Court of Appeals for the Eight Circuit denied the Defendant due process and equal protection of the law.

IX.

REASONS FOR THE ISSUANCE OF THE WRIT

Petitioner would show that the writ of certiorari should be allowed pursuant to the considerations set out in Rule 17 of the Rules of the Supreme Court of the United States and specifically Rule 17(a) and (c) because the U.S. Magistrate of the United States District Court for the Eastern District of Missouri, the Federal District Court for the Eastern District of Missouri, and the Eighth Circuit Court of Appeals have

decided important questions of Federal law which should be settled by the Court, and further have decided these questions in conflict with applicable decisions of the United States Supreme Court.

1. The Fourth Amendment to the United States Constitution requires that a warrant is not to be issued except upon probable cause shown by oath or affirmation, and therefore the Court erred in issuing search warrants and warrants authorizing surveillance and attachment of electronic devices as said warrants were based upon insufficient affidavits and were issued in the absence of probable cause.

The Fourth Amendment to the United States Constitution requires that a warrant is not to be issued except upon probable cause shown upon oath or affirmation. In the present case, the government obtained certain warrants authorizing surveillance and the attachment of electronic devices to a pallet upon which was placed a Stokes tablet press, said press to be used for making tablets commonly sold

through the pharmaceutical industry. The instant warrants were issued upon affidavits which were lacking in probable cause and therefore, the information and evidence obtained thereunder should have been suppressed. Petitioner would assert that the suppression issue in this case was primary to the government establishing guilt against the Defendant.

Certain United States Courts of Appeal have recognized that electronic surveillance of non-contraband personal property in private or non-public areas intrudes upon legitimate expectations of privacy and therefore such surveillance constitutes a search or seizure within the meaning of the Fourth Amendment. See United States v. Bailey, 628 F.2d 938 at 944 (6th Cir., 1980) and United States v. Moore, 562 F.2d 106 at 111 (1st Cir., 1977) The Moore Court stated:

> "...(T)here is a clear line of demarcation between on the one hand, contraband and other items, such as stolen goods, whose possession is illegal, and on the other, goods,

> whatever their suspected use, whose possession is legal. The narcotics peddler in whose heroin a beeper is planted has no privacy interest in the substance; but the same is not so of legally-possessed substance into which a beeper is placed, even if these are destined later to be used in the commission of a crime. Moore at 111.

It can also be stated that in the instant case there is nothing illegal about the possession of the tablet press. What is illegal is the possession of punches and dies as set forth in 21 U.S.C. §843(a)(5) if same are possessed with the intent to use them to manufacture or make counterfeit drugs. Such illegal intent was never evidenced to the Magistrate when the warrants were issued to allow the electronic surveillance by the placing of a monitoring device on the base of the tablet press.

The initial affidavit presented to the U.S. Magistrate at most asserted only that the original named purchasers were not licensed

by the Drug Enforcement Administration to manufacture methaqualone. As previously stated in this petition, the affidavit stated in effect: the affiant was a D.E.A. agent with experience in controlled substance enforcement; electronic device to be used is only an electronic "tracking device"; an unnamed "confidential" informant reported that two individuals ordered a tablet press and punches and dies from Advance Engineering; Advance Engineering is a legitimate business dealing in tablet presses and punches and dies; the informer had given information in the past which resulted in the arrest of at least four people; and the informer states that the press is to be moved within seven days. From the statements contained in the affidavit, it is submitted that same do not evidence or prove an intent to possess so as to counterfeit drugs. Any one of many reasons may be asserted for the purchase of the press, including a specific reason of purchasing the same along with punches

and dies for resale to one licensed to manufacture drugs. Merely because the purchasers of the press, namely the Petitioner, was not licensed with the D.E.A. was not sufficient to show the requisite intent under the statute. Furthermore, mere suspicion of the agent of the D.E.A. that such a machine was to be used for clandestine purchases was wholly unsupported by the specific facts set forth in the affidavit tendered to the U.S. Magistrate.

It was stated in the hearing before the U.S. Magistrate upon motions to suppress that the tablet press was taken to a private property outside the normal view of the public. (Tr. 293-94) Thus, the surveillance through the use of the electronic monitoring device attached to the tablet press constituted an invasion of the Petitioner's expected privacy and was thus a search within the meaning of the Fourth Amendment to the United States Constitution. Furthermore, such a search within the meaning of the Fourth Amendment must satisfy standards heretofore

set forth to hold such a search as being permissible. In the instant case, where the warrant was issued by the Magistrate, the search could only be legal if the warrant were supported by probable cause. In the instant case, no probable cause was shown specifically in that the confidential informant was never identified, his credibility was not established sufficiently, and there was absolutely no showing of a possibility of criminal activity. Hearsay statements of the informants are to be measured by the standards set forth by this Court in the case of Aguilar v. Texas, 378 U.S. 108, 84 S.Ct. 1509 (1964), which case set forth a two pronged test which allows an affidavit to be based upon hearsay testimony if the issuing magistrate is informed of underlying circumstances from which the informant acquired his information and underlying circumstances from which the affiant concluded the informant was credible or his information reliable.

The Court is further cited to the case of Spinelli v. United States, 393 U.S. 410, 89 S.Ct. 584 (1969) which reaffirmed the Aguilar test and indicated that where an affidavit did not detail the manner in which the information was gathered, it could still satisfy part of the Aguilar test if such statement provided a description of the accused's criminal activity in sufficient manner such that the magistrate may know the informant is relying upon something more than a mere suspicion or supposition. This did not occur in the instant case. The original application for the surveillance device was based upon a tip from an unidentified informant. Such tip did not meet the two pronged standard set forth in the Aguilar case.

The only effort made to show that the informant's credibility is the affiant's statement that the informant had given information on prior occasions in which the accuracy was verified by the D.E.A. agents and the information resulted in other arrests. Such

a statement in no way establishes credibility and merely shows that the D.E.A. chose to believe the information from the informant to arrest persons. It is inconceivable that such a statement could establish an informant's credibility without something more. Such would lead to wholesale arrests of individuals where probable cause is lacking or conviction is impossible while allowing such to be used to credit the informant. The Eighth Circuit Court of Appeals in prior cases in the past has allowed prior information prompting arrest to be used to show an informant's reliability. but, in those cases the Eighth Circuit not only found that such information was present, but also that the informer had firsthand knowledge or personal observation of the occurrencs that were reported to the government's agents. See United States v. Skramstad, 649 F.2d 1259 (8th Cir., 1981); United States v. Fleming, 566 F.2d 623 (8th Cir., 1977). In the instant case, we have a much different situation. The informant herein is reported

to have given information in the past leading to the arrest of four persons, but there is no indication whether all these arrests were on separate cases or only one case. agent Wagner of the D.E.A. testified that the arrests were "pending" but currently there were no prosecutions which have come to court on the information provided by the informant. (Tr. 87) Such would indicate that the arrests made based on the information of the informant were either quite recent or had no value at all and thus no prosecutions occurred. The tip provided by the informant in the instant case did not indicate any illegal activity and does not show that such information was gathered from firsthand knowledge or personal observation, unlike the information provided in Skramstad and Fleming. Thus, there is no basis for determining the informant is credible or his information reliable.

Furthermore, the affidavit in this case fails to show that said informant gathered

his information in a reliable manner and further such failed to show sufficient details of any alleged criminal activity. Such can hardly be sufficient detail of criminal activity to satisfy a prong in the Aguilar test.

The Fifth Circuit Court of Appeals was faced with an affidavit containing similar information in the case of United States v. Chavez, 482 F.2d 1268 (5th Cir., 1973) In that case, an informant related that certain drugs were to be moved within a twenty-four hour period. The Court held that such information was insufficient to establish the probability of criminal activity . The instant case is even less likely to establish such a probability. In the Chavez case, the informant was reporting the actual movement of controlled substances. In the instant case, the informant was merely reporting that someone placed an alleged order and proposed movement of non-contraband goods. Such is clearly insufficient to establish the probability of criminal activity.

The affiant in the affidavit attempted to corroborate the tip by stating that in his experience in law enforcement he is led to believe that the goods will be used for illegal purposes. Such, at best, is no more than a mere suspicion on the part of the affiant, and further, based upon the affiant's testimony before the U.S. Magistrate in the suppression hearing, said affiant stated he was never told what the press, punches and dies were to be used for and specifically he was never told they were to be used to manufacture illegal drugs. (Tr. 56-57) The affiant then continued in his testimony and stated:

> Q. Drugs had not been mentioned, is that correct?
>
> A. Yes, sir.
>
> Q. You had no idea what the use of the press was at that time?
>
> A. I had an assumption on my part. (Tr. 58)

A mere assumption by an officer is not sufficient corroboration of information and certainly is not sufficient probable cause upon which to issue the warrant as requested by the D.E.A. agent. Further, there is no evidence that the investigation by the D.E.A. officer revealed either the alleged buyers to be registered to manufacture methaqualone or that one needed to be registered to manufacture methaqualone to purchase such a machine. Possession of such goods is not illegal unless the punches and dies are possessed with the criminal intent requisite in the statute, i.e., to counterfeit drugs.

For all of the above reasons, it is above, it is obvious that the search warrant issued by the Magistrate allowing electronic surveillance of the tablet press was not based or predicated upon sufficient probable cause as required by the cases. Thus, since probable cause was lacking, the electronic surveillance as initiated was an illegal search under the Fourth Amendment, and any

information thereby obtained should have been suppressed. See Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407 (1963) and United States v. Crews, 445 U.S. 463, 100 S.Ct. 1244 (1980).

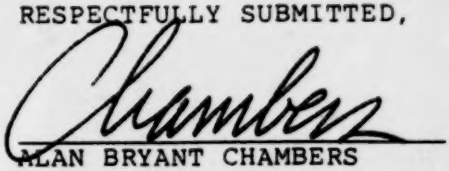
X.

CONCLUSION

For the reasons set out in the foregoing petition, Petitioner concludes that there was a gross and severe deprivation of his Fourth Amendment rights secured under the Constitution of the United States. Petitioner would further conclude that based upon such deprivation, he was denied both substantive due process of law as well as equal protection of the law.

Wherefore, Petitioner prays that the Supreme Court grant this petition for writ of certiorari and allow the Petitioner to brief this matter to this Honorable Court upon the merits.

RESPECTFULLY SUBMITTED,



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CERTIFICATE OF SERVICE ON COUNSEL

I, Alan Bryant Chambers, Attorney for Petitioner, hereby certify that on the 30 day of June, 1983, I mailed three copies of the foregoing petition for writ of certiorari to Mr. Richard Poehling, Assistant United States Attorney, United States Courthouse, 1114 Market Street, St. Louis, Missouri, by placing said copies in the hands of employees of the United States Postal Service for mailing, and paying the postage thereon.

ALAN BRYANT CHAMBERS

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 82-1696

UNITED STATES OF AMERICA,

APPELLEE,

V.

TILLMAN J. BENTLEY,

APPELLANT.

Appeals from the United States District Court for the Eastern District of Missouri.

No. 82-2337

UNITED STATES OF AMERICA,

APPELLEE,

V.

NATHAN PLATT,

APPELLANT.

APPENDIX A

Submitted: January 12, 1983

Filed: April 15, 1983

Before ROSS, Circuit Judge, HENLEY, Senior Circuit Judge, and FAGG, Circuit Judge.

HENLEY, Senior Circuit Judge.

In these consolidated appeals, Tillman J. Bentley and Nathan Platt challenge their convictions for certain drug-related offenses. We affirm.

I.

From the evidence adduced at trial, the background of these cases may be briefly reconstructed as follows. In August of 1981 the president of Advance Engineering, a St. Louis company engaged in the manufacture of pharmaceutical punches and dies, contacted the Drug Enforcement Agency (DEA) concerning an unusual inquiry he had received in connection with the purchase of a tablet press. While negotiations continued with respect to the

purchase, the DEA initiated an investigation and began surveillance of the company premises. Prior to the consumation of the sale, agency officials secured the approval of a United States Magistrate for the installation and monitoring of an electronic tracking device,[1] which was placed on a wooden pallet connected to the tablet press.

In addition to the press, tooling designed with the name "Lemmon 714," the imprint of a pharmaceutical company which produced methaqualone, a controlled substance, was also to be purchased. This tooling had been selected by appellant Nathan Platt during negotiations for the sale of the tablet press, and was subsequently installed in the machine.

On August 26 Platt and Ralph Reff arrived at Advance Engineering to pay the balance of the purchase price and pick up the press. Platt placed the equipment in a pickup truck

[1]The tracking device, or beeper, emitted periodic signals which could be picked up by a receiver.

and departed; Reff subsequently left in a separate vehicle.

Utilizing the electronic tracking device as well as visual surveillance, DEA agents followed Platt, who eventually took the tablet press to the rural property of appellant Tillman Bentley, a physician. There, the machine was unloaded and placed in a shed. Surveillance continued uneventfully until September 14, when the press was moved to another location. While tracking this move, the agents lost the signal from the transmitting device in a rural area. In attempting to relocate the signal and tablet press on foot, they purportedly inadvertently entered the property of Gary Black,[2] where the press was discovered in the pickup truck, which had been backed into a small barn.

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[2]The entry onto Black's property occurred on a foggy night in a rural area. It is said that in following what they believed to be a public road, the agents had actually entered the property through a driveway.

The press was not moved again until September 30, when it was taken to the property of Gary Combs. Shortly after this move, the agents began to experience difficulties with the tracking device. After obtaining a search warrant, they entered Comb's property to ascertain the feasibility of replacing the device. When this examination indicated the replacement was possible, the agents sought and received a second warrant which authorized the placement of two new tracking devices, one in the pallet and the other on the undercarriage of the truck. Following the installation of the devices, a court order permitting continued surveillance was issued.

On November 5 DEA agents received warrants for the seizure of the tablet press and the arrest of Gary Combs. Also on this date the agents were notified by Advance Engineering that an inquiry had been made about the return of the machine. After the issuance of the warrants, Comb was arrested and the press

seized. Combs agreed to cooperate with the authorities, and with his consent two telephone calls and a meeting with Gary Black were subsequently recorded.

The investigation culminated with indictments against Black, Bentley and Platt. Both Platt and Bentley were charged with conspiracy to manufacture methaqualone, in violation of 21 U.S.C. § 841(a)(1), and, in separate counts, with possession of punches and dies designed to imprint a pharmaceutical company marking for methaqualone, in violation of 21 U.S.C. § 843(a)(5). Platt's motion for severance was granted, and following a joint jury trial both Bentley and Black were convicted. Platt was convicted in a subsequent jury trial. These appeals followed.

II.

Both Bentley and Platt initially contest the propriety of the judicially authorized electronic surveillance and the resulting seizure of the press. Specifically, appellants urge (a) that the warrants which originally permitted the surveillance were unlawful

because they were not supported by probable cause; and (b) that the warrants issued subsequent to the agents' entry onto the property of Gary Black were unlawful because the agents had entered that property illegally. We examine these contents in turn.

A.

In challenging the propriety of the warrants that sanctioned the electronic surveillance, appellants focus upon information supplied to the authorities by a confidential informant[3] which served as the primary basis for the original affidavit and search warrant request. They contend that the affidavit did not sufficiently demonstrate probable

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[3]Appellants also question the district court's refusal to compel disclosure of the identity of the confidential informant. Assuming this claim was properly preserved for appellate review, we find no error. We are not convinced that disclosure was relevant or required for essential fairness. See McCrary v. Illinois, 386 U.S. 300 (1966); Roviaro v. United States, 353 U. S. 53, 60-61, (1957); United States v. Skramstad, 649 F.2d 1259, 1265 (8th Cir. 1981).

cause, that the surveillance was therefore unlawful, and that any evidence obtained incident to the warrants' execution consequently should be suppresed. Although we find that a close question may be presented, we conclude that the challenged affidavit adequately established probable cause.

The original warrant was issued on the basis of information contained in an affidavit signed by Agent Anton Wagner, a St. Louis police detective assigned to DEA work. In essence, the affidavit recited the following: In August of 1981 Wagner received information from a confidential informant concerning the purchase of a tablet press. This informant had provided information on prior occasions concerning violations of state and federal controlled substance laws. On each of these occasions, Wagner or other DEA agents had verified the informant's accuracy, and the tips have resulted in the arrest of at least four persons, with cases pending. The information received in August

of 1981 indicated that individuals using the names "R. Reff" and "Irv Fischer" had ordered a tablet manufacturing press from Advance Engineering and Manufacturing Company in St. Louis County, Missouri. The informant further stated that in addition to the press, these individuals had also ordered a set of punches and dies bearing the marking "Lemmon 714"; this mark was recognized by Wagner as a pharmaceutical identification for tablets of methaqualone, a controlled substance. Based on the information Wagner had received, the DEA conducted an investigation which revealed that neither "R. Reff" nor "Irv Fischer" was a licensed registrant with the agency for the manufacture of methaqualone and verified the existence and legitimacy of Advance Engineering.

On the basis of this information, Wagner sought judicial authorization to install the electronic tracking device and to monitor the movement of the press. This authorization was granted by a United States Magistrate on August 18, 1981.

Our evaluation of the adequacy of this affidavit is guided by the principles delineated by the Supreme Court in Aguilar v. Texas, 378 U.S. 108 (1964), and Spinelli v. United States, 393 U.S. 410 (1969). In order to adequately establish probable cause, an affidavit based upon information provided by an undisclosed informant must (1) set forth some of the underlying circumstances necessary to enable the judicial officer to independently judge the validity of the informant's conclusions, and (2) reveal facts sufficient to allow a determination of either the credibility of the informant or the reliability of his information. Aguilar, 378 U.S. at 114; see also, e.g., United States v. Carlson, 697 F.2d 231, 237 (8th Cir. 1983). In the absence of circumstances indicating the basis of the information, a tip may satisfy the first prong of the Aguilar standard if it describes the "criminal activity in sufficient detail that the magistrate may know that he is relying on something more substantial than a casual rumor circulating in the underworld or an accusation

based merely on an individual's general reputation." Spinelli, 393 U.S. at 416.

We are also mindful of the fact that courts "evince a strong preference for searches made pursuant to warrant, and, in some instances, may sustain them where warrantless searches based on a police officer's evaluation of probable cause might fail." Carlson, 697 F.2d at 237 (quoting United States v. Brown, 584 F.2d 252, 256 (8th Cir. 1978), cert. denied, 440 U.S. 910 (1979)). Further, "reviewing courts should interpret affidavits for search warrants in a commonsense and realistic fashion, and deference is to be accorded an issuing magistrate's determination of probable cause." Id. (quoting United States v. Leightling, 684 F.2d 553, 555 (8th Cir. 1982), cert. denied, 51 U.S.L.W. (Feb. 22, 1983)).

Applying these principles to the present case, we are satisfied that the affidavit in question provided a sufficient basis for the magistrate's finding of probable cause.

Appellants' primary contention is that many of the facts recited in the affidavit reflect actions which do not alone constitute criminal activity. As we recently noted, however,

> [the] observation of apparently innocent can be "significant to a trained officer" and ... the officer is "entitled to assess probable cause in light of his experience." ... In addition, "[i]t is settled in this circuit that when an application for a warrant is being considered, the issuing magistrate may properly rely on normal inferences drawn by the surrounding circumstances and the allegations of facts contained in the affidavit."

Carlson, 697 F.2d at 238 (citations omitted). In this case, the informant's tip indicated that two named individuals had arranged for the purchase of a tablet press and dies designed to imprint a pharmaceutical marking recognized by the authorities as a trade name for methaqualone; subsequent investigation revealed tht neither of the purchasers was a licensed registrant for the manufacture of this controlled

substance.[4] We are satisfied that this information, along with the remaining facts recited in the affidavit, raised more than a mere suspicion or conclusion of criminal activity. An affidavit need only establish the probability of such activity; proof beyond a reasonable doubt is not required. See Spinelli, 393 U.S. at 419.

Appellants also contend the affidavit failed to sufficiently demonstrate the credibility of the informant. As indicated, however, it stated that prior information supplied by this person had been verified by DEA agents and had led to at least four prior arrests,

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[4] In this connection, we also observe that 21 U.S.C. § 843(a)(5), which prohibits the possession of dies capable of rendering a drug a counterfeit substance, has been interpreted to apply "whether or not the possessor uses or intends to use the die for that purpose." United States v. Gesualdi, 660 F.2d 59, 60 (2d Cir. 1981) (per curiam).

with cases pending. We have previously concluded that past performance by an informant resulting in arrests may be sufficient to establish the credibility of that informant. United States v. Skramstad, 649 F.2d 1259, 1262 (8th Cir. 1981); United States v. Fleming, 556 F.2d 623, 625 (8th Cir. 1977). The information concerning the past performance of this informant, in the circumstances of this case, adequately demonstrated his credibility.

In sum, we are satisfied that the affidavit in the present case was sufficient to establish probable cause. Having reviewed all the contentions raised by the appellants in this regard, and finding that none compels a contrary conclusion, we uphold the issuance of the search warrants.[5]

The remainder of the opinion is hereafter omitted. ...

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 82-2337-EM — September Term 1982

UNITED STATES OF AMERICA,

APPELLEE,

VS.

NATHAN PLATT,

APPELLANT.

Appeal from the United States District Court for the Eastern District of Missouri

Motion of appellant for rehearing filed in this cause having been considered, it is now here ordered by this Court that the same be, and it is hereby, overruled.

June 2, 1983

APPENDIX B

AMENDMENT 4

Unreasonable searches and seizures. - The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

APPENDIX C